EXHIBIT 5
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HB 557

MISSOULA COUNTY

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MEMORANDUM

TO: Board of County Commissioners

FROM: Michael W. Sehestedt
Deputy County Attorney

RE: HB 557

DATE: February 20, 2007

You have asked me to examine HB 557. to determine what impact the legislation would have on the County's ability to regulate gravel extraction in areas zoned residential.

As you are aware, County zoning currently prohibits the extraction of gravel in County residential zoning districts. Gravel extraction is permitted on open and resource zones and in commercial and industrial zones. This prohibition on gravel extraction in residential areas is based on §76-2-209 which currently allows the adoption of zoning regulations which prohibit the extraction of gravel in areas zoned residential.

HB 557 would amend §76-2-209 in the following manner:

> **76-2-209. Effect on natural resources.** (1) Except as provided in 82-4-431, 82-4-432, and subsection (2) of this section, a resolution or rule adopted pursuant to the provisions of this part, except 76-2-206, may not prevent the complete use, development, or recovery of any mineral, forest, or agricultural resources by the owner of any mineral, forest, or agricultural resource.
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> (2) The complete use, development, or recovery of a mineral by an operation that mines sand and gravel or an operation that mixes

concrete or batches asphalt may be reasonably conditioned or prohibited on a site that is located within a geographic area zoned and taxed as residential, ~~as defined by the board of county commissioners~~.

(3) Zoning regulations adopted under this chapter may reasonably condition, but not prohibit, the complete use, development, or recovery of a mineral by an operation that mines sand and gravel and may condition an operation that mixes concrete or batches asphalt in all zones other than residential.

While no doubt the purpose of the bill is to prevent abusive zoning of large tracts of land as residential as a way of pre-empting gravel development, the effect will be to render zoning protection, from what is essentially a heavy industrial use, non-existent in lower density rural residential zoning districts. To understand why this is so, it is necessary to examine how the property is taxed.

The residential tax classification is Class four (§15-6-134, MCA) and includes both real estate and improvements thereon used for residential purposes. Class Four also includes all land except that specifically included in another class.

For purposes of taxation as agricultural land under Class Three (§15-6-134, MCA), any property of 20 acres to 160 acres not devoted to commercial or industrial purposes is entitled to be taxed as "non-qualified agricultural land." The taxable value for non-qualified agricultural land is based on the productive capacity of average grazing land. Property may also qualify for taxation as agricultural under Class Three by meeting the tests under §15-7-202, MCA (essentially either more than 160 acres or producing more than $1,500 in gross agricultural income from a tract of any size). All property taxed as agricultural is taxed based on its productive capacity and not on market value. Because the taxable value of agricultural land is so much lower than market value, the agricultural tax classification almost universally applies to all undeveloped land in 20 acre and larger parcels.

Since a twenty-plus acre parcel in an area planned and zoned for residential development and surrounded by homes will be taxed as agricultural, the proposed HB 557 amendment means that because a property owner understandably taken advantage of an opportunity to pay less in taxes on his land than his neighbors are paying, that property owner is now exempt from the zoning limitation on gravel extraction.

Given that Missoula County has large areas which were zoned low-density residential in the late 1970s (for example, C-A2, one dwelling unit per 10 acres;

CA-3, one dwelling unit per 5 acres; and C-RR1, one dwelling unit per 1 acre) and given that within these zoning districts there remain a number of tracts held for actual agricultural use or acquired for future development that, because they exceed 20 acres in size, are taxed as agricultural, adoption of HB 557 has the possibility of allowing gravel extraction in the middle of established residential areas.

If gravel extraction must be permitted, then under Missoula County v. American Asphalt, 216 Mont. 423, 701 P2d 990 (1985), the owner must be allowed to sort and crush gravel, to operate an asphalt or concrete mixing plant and do any other processing of gravel on site that will contribute to the economic success of the venture. These are heavy industrial uses that no one thinks appropriate for a residential setting. Similarly, because infrastructure is designed and built based on planned and permitted uses, development of a gravel-based industrial complex using rural residential infrastructure may create serious risk to residents and require the County to incur substantial additional costs to repair and maintain roads paved to a residential standard which would be used by heavy industrial traffic in the course of a gravel operation.

My recommendation is to oppose this bill. If there are problems elsewhere with abuse, those specific issues should be addressed. As it stands, this bill would strip from numerous homeowners in our rural residential areas the protection now afforded by zoning from the development of a heavy industrial use in their neighborhood.